NO. 80-6877

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JAMES E. MESSER, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether Petitioner's receiving two psychiatric exams by a state expert was sufficient to satisfy constitutional requirements.

2.

Whether the trial court properly denied Petitioner's request for a change of venue and determined that there was not sufficient pretrial publicity to prevent Petitioner's receiving a fair trial.

3.

Whether the trial court properly exercised its discretion denying Petitioner's motion for a mistrial after giving the jury proper instructions concerning comments made in the courtroom by the father of the victim.

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PART ONE

STATEMENT OF THE CASE

Petitioner, James E. Messer, Jr., was indicted in Polk County, Georgia during the November Term, 1979, for kidnapping with bodily injury and the murder of Rhonda Tanner. (R. 21). A special plea of insanity was filed on behalf of the Petitioner, but psychiatric examinations concluded that Petitioner was mentally competent to stand trial and criminally responsible at the time of the crime. Subsequently, the special plea of insanity was withdrawn. (R. 34). Following a trial by jury, Petitioner was found guilty on both charges and sentenced to life imprisonment for kidnapping and to the death penalty for murder. The jury fixed the punishment as death for the murder finding that the offense of murder was committed while engaged in the commission of another capital felony, that being

kidnapping with bodily injury, and that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture to the victim. See Ga. Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). (R. 79-81).

After Petitioner's motion for new trial was denied, he filed a notice of appeal to the Supreme Court of Georgia. On direct appeal, the Supreme Court of Georgia considered, among other issues, the issues presented by the instant petition. The Supreme Court determined that the trial court did not abuse its discretion in denying a request for an independent psychiatric evaluation, that there was no error in failing to grant the motion for a change of venue and that the court did not err in denying the motion for mistrial. Messer v. State, 247 Ga. 316, 276 S.E.2d 15 (1981). Petitioner's motion for a rehearing was denied by the Supreme Court of Georgia on March 18, 1981.

The Petitioner subsequently filed the instant petition for a writ of certiorari in this Court challenging the conviction and sentence imposed by the Superior Court of Polk County, Georgia. Additional facts will be developed as necessary for a more thorough consideration of the issues presented by the present petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT PROPERLY DENIED PETITIONER'S REQUEST FOR AN INDEPENDENT PSYCHIATRIC EXAMINATION AFTER HAVING HAD THE PETITIONER EXAMINED ON TWO SEPARATE OCCASIONS.

Petitioner is challenging before this Court the trial court's refusal to grant an independent psychiatric examination at state expense. Petitioner makes this challenge in spite of the fact that two psychiatric examinations were conducted prior to trial.

Prior to Petitioner's trial, his counsel filed a special plea of insanity asserting Petitioner's incompetency to stand trial. (R. 21). In conjunction with his plea, Petitioner filed a motion for private psychiatric examination at government expense. (R. 22). A hearing was held on this motion and arguments were presented on December 18, 1979. The trial court overruled the motion on December 20, 1979. (R. 24). Petitioner then filed a motion for reconsideration and the court again heard argument on this motion on January 8, 1980. This motion was also denied by the court. (R. 30).

At the time of the initial hearing on December 18, 1979, Petitioner had already been examined by a psychiatrist at the state facility in Milledgeville, Georgia. The Court stated at that time that it was of the opinion that it would be better to have any additional examination concerning competency made closer to the time of trial. Although the court denied the motion for additional independent psychiatric examination, the court did order that the Petitioner be returned to the state facility at Milledgeville, Georgia to be reexamined on his

ability to stand trial. (R. 30). This Order was entered less than one month before trial. Subsequently, the Petitioner withdrew his special plea of insanity. (R. 34).

This issue was presented to the Supreme Court of Georgia on direct appeal. The court ruled that the granting of a motion for independent psychiatric examination fell within the discretion of the trial court and would not be overturned without a showing of abuse of the discretion. The court found no such abuse. Messer, supra, 276 S.E.2d at 19.

Petitioner asserts that this Court should grant certiorari to consider this issue alleging that this Court has not ruled on an indigent's right to state appointed experts. Petitioner also asserts that several lower courts have found that this right was contained in the Fourteenth Amendment and in the Sixth Amendment. Petitioner also asserts that this falls within the requirement that the type of trial one receives should not depend on the amount of money he has available.

It is clear that the general procedure for examining indigent defendants at public facilities does not necessarily fail to pass constitutional scrutiny. Satterfield v. Zahradnick, 572 F.2d 443 (4th Cir. 1978). Furthermore, Respondent asserts that an indigent defendant is not entitled to repeated psychiatric examinations after there has been competent evidence obtained on the issue of his competency and criminal responsibility. See Smith v. Baldi, 344 U.S. 501 (1953); McGarty v. O'Brien, 188 F.2d 151 (1st Cir. 1951). To make such a finding would allow a defendant the opportunity to search for the diagnosis he desires at public expense. Such a search would not contribute to the legitimite ends of justice.

In the instant case, the Petitioner received two psychiatric examinations on his criminal responsibility and competency to stand trial. The second examination was specifically conducted

approximately a month before trial to allow a more definite examination on Petitioner's competency. Petitioner has at no time challenged the qualifications of the psychiatrist making the examination or the findings made by the psychiatrist. Petitioner has made no showing that the psychiatrist was biased in any manner. No evidence was presented to the trial court to contradict any of the psychiatric findings. Petitioner did not present any lay witnesses showing that he had behaved strangely, nor did he present any expert testimony to this effect. Petitioner's counsel did not make any statements that he was unable to communicate with his client, nor did he state that his client could not participate in his defense.

A particularly important factor in the instant case is that Petitioner withdrew his special plea of insanity prior to trial. It should also be noted that at one of the hearings on Petitioner's motion for new trial, the trial court specifically questioned the Petitioner himself regarding the withdrawal of the plea. The Petitioner was asked if his counsel discussed that withdrawal with him and if he agreed to it. Petitioner stated that it was discussed with him and he did agree to withdraw the plea. (April 8, 1980, at 15). No evidence was ever shown to the court that the Petitioner was incompetent to stand trial. Furthermore, no evidence was presented at trial to show that Petitioner may have not been criminally responsible at the time of the commission of the crime. The only statements made were those made by counsel at the time he asked for the independent examination in which he stated that psychiatric problems might arise. This is not supported by any evidence nor is it supported by the actions of the Petitioner at trial or at his motion for new trial hearing.

Petitioner has asserted that this Court should grant certiorari, citing decisions of various circuits, allegedly finding a constitutional right to state paid experts. In considering the cases cited by the Petitioner, it is clear

that there has been no such general finding, particularly in cases where examinations had already been conducted by state psychiatrists. In Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980), the court was concerned with the cause of death, not with the mental state of the defendant. The doctor's testimony in that case was itself inconclusive. The trial court had completely denied any expert assistance whatsoever. The court found that counsel could not adequately cross-examine the expert or present evidence to contradict his finding on the cause of death without additional assistance. The court specifically noted that there must be a substantial question which requires the expert testimony and without which the defense could not be fully developed. Williams, supra at 1026, citing Jacobs v. United States, 350 F.2d 571, 573 (4th Cir. 1965). In Jacobs, the court noted that the testimony showed that the claim of mental incapacity was substantial and not frivolous. The court looked to see if there was a substantial question over an issue which required expert testimony to resolve it. Jacobs, supra. Furthermore, in Satterfield, supra, the Fourth Circuit Court of Appeals looked at the State's refusal to appoint an independent psychiatrist. The Court held, "Whatever may be the extent of an indigent's right to an impartial psychiatric evaluation to enable him to place the issue of insanity before the trial court. . . we are of opinion, on authority, that there exists no constitutional right to the appointment of a private psychiatrist of the defendant's own choosing at public expense." Satterfield, supra at 445, citing McGarty, supra. The state procedure in Satterfield, as in the instant case, provided an adequate opportunity for the defendant to place the issue of mental capacity before the court. No more is required of the state court.

In Bush v. McCollum, 231 F.Supp. 560 (N.D. Tex. 1964), affirmed, 344 F.2d 672 (5th Cir. 1965), cited by the Petitioner, the court was faced with a defendant who had been previously

adjudicated insane. In that case, the court found that the state had the burden of proving sanity beyond a reasonable doubt. The defendant's motion to be sent to the state hospital was denied as was his motion for funds. The defendant was found sane based only on the testimony of lay witnesses and a doctor not specially trained in mental health problems. Under these specific facts and circumstances, the court found that the Petitioner did not receive a fair trial and effective assistance of counsel. In the instant case, not only has the Petitioner never been adjudicated insane, but no evidence has ever been introduced to show that he has had any mental problems. Thus, the State does not have the same burden as was found in Bush, supra.

There has been no evidence introduced in the instant case to show that the psychiatrist that examined the Petitioner was not impartial. Nor has there been any challenge made as to the findings by the psychiatrist. This also does not present a case in which the Petitioner was totally denied psychiatric examinations by the court. The Georgia Supreme Court has noted on numerous occasions that once a court-appointed psychiatrist has examined a defendant and found him to be sane or competent, there is no denial of due process in a refusal to furnish an additional psychiatrist at public expense. See Leggett v. State, 244 Ga. 226, 259 S.E.2d 476 (1979); Hamby v. State, 243 Ga. 339, 253 S.E.2d 759 (1979); Jackson v. State, 225 Ga. 790, 171 S.E.2d 501 (1969).

Resondent asserts that Petitioner has made no showing of a constitutional question for review by this court. Petitioner was granted a psychiatric examination on two separate occasions by the trial court. Petitioner has not challenged the findings by that psychiatrist nor shown any partiality or incompetency on the part of said psychiatrist. Furthermore, no evidence was presented concerning Petitioner's alleged incompetency or insanity at the trial. Based on all of the above, Petitioner has not shown

a federal constitutional violation, nor has he shown that he was denied a fair trial by the failure of the trial court to grant a psychiatric examination by an independent psychiatrist. The review conducted was adequate to allow Petitioner's counsel to prepare for trial and Petitioner has not shown any manner in which he was denied effective assistance of counsel in this regard. Thus, Petitioner has presented no constitutional question for review by this court.

II. THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR A CHANGE OF VENUE AND DETERMINED THAT THERE WAS NOT SUFFICIENT PRETRIAL PUBLICITY TO PREVENT PETITIONER'S RECEIVING A FAIR TRIAL.

Petitioner asserts that the trial court improperly denied his motion for a change of venue and that this denial prevented him from receiving a fair trial by an impartial jury. Petitioner asserts that if there is a reasonable likelihood of prejudice, a change of venue should be granted. Petitioner further asserts that the information presented prior to trial was extensive and inflammatory, not factual.

Petitioner filed a motion for a change of venue prior to trial asserting that he could not receive a fair trial due to the publicity in the case. (R. 5). A hearing was conducted on December 6, 1979 at which time Petitioner introduced newspaper articles published concerning Petitioner's arrest and certain pretrial events. Petitioner made a renewed motion for a change of venue in which he submitted other newspaper articles to the court. (R. 37).

At the hearing on the motion for a change of venue, witnesses testified for the State and for the Petitioner. One witness

testified that she did not feel that the Petitioner could get a fair trial in the community, while the clerk of the court testified that she had a fixed opinion as to guilt or innocence. The State presented four witnesses who testified that they felt that Petitioner could get a fair trial because they did not believe the community at large had formed an opinion as to the guilt or innocence of the Petitioner. The trial judge found that the evidence failed to show that a fair and impartial jury could not be impanelled. Thus, he denied the motion for a change of venue. (R. 47). The Court gave the Petitioner the right to renew this motion after voir dire.

Petitioner filed a supplement to his renewed motion for a change of venue in which he included other newspaper articles published in the area. (R. 53). Petitioner did not make a renewed motion for a change of venue after the voir dire was conducted.

This issue was presented to the Supreme Court of Georgia on direct appeal. In considering the issue, the court noted that most of the forty-eight prospective jurors examined stated that they had been exposed to varying degrees of publicity.[1] Messer, supra, 276 S.E.2d at 21. Only four jurors were excused by the court because they stated they would not be able to put aside any prejudice arising out of the pretrial publicity and render a verdict based on the evidence. As noted by the Supreme Court of Georgia, "This low percentage of verniremen excused for prejudice (approximately 8.3 per cent) corroborates the absence of such prejudicial publicity as would require the grant of a motion for a change of venue." Id. at 21. The

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1/ This Court should note that many jurors stated that they had heard nothing for several months and that many jurors stated that they could not remember what they had read. Others just remembered having read certain things about the case, but stated that it did not have an effect on their opinion.

court specifically contrasted this with the case of Irvin v. Dowd, 366 U.S. 717 (1961) in which this Court essentially determined that excusing some 62 per cent of the jury panel corroborated a finding of jury partiality.

Under the decisions of this Court, the proper test for a prospective juror in determining whether Petitioner has received an impartial jury is whether a juror "Can lay aside his impression or opinion and render a verdict based on the evidence presented in the court." Irvin, supra at 723. In formulating this test, this Court in Irvin v. Dowd stated:

> "It is not required, however, that the jurors be totally ignorant of the issues and facts involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particulaly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard."

Id. at 722,723. This Court also found that a petitioner must show the actual existence of an opinion in the mind of the juror such as to raise a presumption of partiality, otherwise, the juror need not be excused. Id. at 723.

Petitioner has attempted to compare this case to those cases in the past in which this Court has reversed decisions

based on the existence of pretrial publicity and a finding that there was not an impartial jury. It is clear that the instant case is not even vaguely analagous to those cases cited by the Petitioner.

In Irvin, supra, there was an overwhelming amount of publicity generated prior to trial. Once the jury had been selected, eight of those twelve juros selected did have some opinion on guilt or innocence. Almost 90 per cent of the entire panel had some opinion as to guilt of the defendant. In Irvin, the trial court excused some 268 jurors out of a total of 430 in the entire panel for cause based on their fixed opinions as to guilt or innocence. This Court noted that this showed a pattern of deep and bitter prejudice. Irvin, supra at 727.

In Groppi v. Wisconsin, 400 U.S. 505 (1971), this Court remanded the case based on the trial court's refusal under a Wisconsin statute to consider a change of venue. Wisconsin did not allow a change of venue in misdemeanor cases and the court did not even consider the evidence or use its discretion in making its ruling.

The pretrial publicity and publicity surrounding the trial in Sheppard v. Maxwell, 384 U.S. 333 (1966), was so extensive that the publicity in the instant case was minimal by comparison. In Sheppard, the jury was not sequestered, newsmen took over the courtroom and essentially created a carnival type of atmosphere. This Court, in later considering these cases, noted, "In each of these cases, this Court overturned state court convictions obtained in a trial atmosphere that had been utterly corrupted by press coverage." Murphy v. Florida, 412 U.S. 794, 798 (1975). The instant case could hardly be compared to a case in which the press coverage "utterly corrupted" the entire atmosphere of the trial.

This case is more closely analogous to that in Murphy, in which the number of persons excused for cause in no way suggested "a community of sentiment so poisoned as to impeach the indifference of jurors who displayed no animous of their own." Murphy at 803. There was no hostility shown in the instant case by the jurors questioned. Even those who expressed a fixed opinion did not show any hostility toward the Petitioner.

In the instant case, Petitioner has relied largely on the amount of publicity allegedly found before trial. Petitioner has not directed his argument to portions of the record which would require a finding of constitutional unfairness. In this situation as found by this Court in Dobbert v. Florida, 432 U.S. 282, 303 (1977), the actual knowledge in the community concerning the case is not sufficient in itself to render the trial constitutionally unfair. This Court noted that there would be a presumption of partiality and unfairness absent the total corruption by press coverage referred to in Murphy, supra.

Respondent asserts that in considering the totality of circumstances in the instant case, the pretrial publicity was not sufficient to create a presumption of partiality on behalf of the jurors. In considering the voir dire of the jurors, it is clear that, although most jurors were aware of certain facts surrounding the case, the amount of publicity did not render the trial fundamentally unfair. Only a very few jurors could not put aside what they had heard and render a decision based solely on the evidence in the case. Most of the jurors questioned did not have an opinion as to the guilt or innocence of the Petitioner, and those few that did were excused for cause. Thus, Petitioner has failed to show that "The setting of the trial was inherently prejudicial or that the jury selection process of which he complains permits an inference of actual prejudice." Murphy, supra at 803. Thus, Respondent asserts that there is no constitutional issue presented for review by this Court.

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL AFTER COMMENTS WERE MADE IN THE COURTROOM BY THE VICTIM'S FATHER.

During the trial of the case, the father of the victim made a sudden outburst in the presence of the jury. The father had testified and both the parties had agreed to allow the father to remain in the courtroom during the remainder of the trial. This was done with the understanding that he had been instructed not to make any comments.

During the testimony of one witness in which he was relating statements made by the Petitioner, Mr. Tanner, the victim's father, stood up and moved forward toward the Petitioner. Mr. Tanner made comments to the effect that the Petitioner was liable and he would pay. The Petitioner requested a mistrial at that point. The jury had been removed from the courtroom. as had Mr. Tanner.

When the jury returned to the courtroom, the Court instructed the jury as follows:

> "Ladies and Gentlemen of the Jury, the outburst which you observed during the testimony of Mr. Leary, as you know, because he testified in the beginning of the case, was the father of the deceased child involved in this case. He was allowed to stay in the courtroom because he had requested to stay in the courtroom after his testimony. It is not unusual for family members to be allowed to see and to observe a trial. From his testimony, obviously he

knows nothing about the facts that relate to any guilt or innocence of the defendant and his outburst should have no weight whatsoever with your determination as to the guilt or innocence of this defendant. You are to act only on the evidence as produced to you either by physical evidence or from sworn testimony from the stand and not from any outburst by a member of a family of anyone who is deceased or is a recipient of a crime. Now, I would like to know if there are any of you who feel this would in any manner bother you or affect you in acting as a juror under the instructions of the court at the end of this trial? Are there any who have any feelings whatsoever and I want you to be very frank and candid with me on this. If you feel that it might in any manner affect your consideration of this case, I would like for you to let me know."

(T. 379). There was no response from any juror at this point. The court then continued with its instruction as follows:

"I am going to ask you then to disregard completely any passion or demonstration shown by this father and I will charge you at the end of this case, but I now want you to determine that your verdict will not in any manner be affected by any outburst in the courtroom."

(T. 379).

Further discussion continued between counsel for the defense, the district attorney and the court concerning the motion for mistrial. The court then stated:

> "I believe I have instructed them as well as I can concerning the incident, and have their assurance that it did not and would not in any manner affect the verdict concerning the guilt or innocence of the defendant. And in view of the fact that it was an isolated outburst by a member of the deceased person's family, that is not an unusual occurrence for a member of the family to be quite upset, and I believe under the circumstances that it would have no chance of affecting the jury's verdict as to the guilt or innocence of the defendant. I have instructed them that obviously the father knew nothing about the material facts of this case and could not know at all himself whether or not this defendant was guilty or innocent. I think in view of that, I will overrule the motion for a mistrial."

(T. 382). At this point, the jury was returned and the trial continued with Mr. Tanner being absent from the courtroom.

At the conclusion of the guilt-innocence phase of the trial, counsel for the defense renewed the motion for a mistrial. The court then stated that it felt that it would be improper to mention the punishment phase at that time and that if the trial came to that point, instructions would be given at that stage.

The jury returned a verdict of guilty on both counts. At that time, the court instructed the jury as follows:

> "Ladies and Gentlemen, having found the accused guilty, it now has become your duty to fix a punishment for that offense and we would enter into the punishment phase now. In view of the outburst which occurred during the trial, I asked you at that time if there was any problem in your mind or any question in your mind, whether that outburst could affect your conduct as a juror concerning the guilt or innocence of the accused. In entering the punishment phase, I now also would like to ask you if in any manner you feel that could affect you, or be any problem, or in any manner influence your conduct as a juror in the punishment phase of this trial. If you think it would, please let me know."

(T. 500). No response was made by any juror. The court then continued its instructions stating as follows:

> "Again then, I caution you that in no manner should anything other than the evidence and your own conscience, and the argument, and the charge of the court influence your verdict."

(T. 500). The trial then proceeded into the punishment phase.

It is clear from the above that the trial court clearly instructed the jury after the outburst, during the guilt-innocence phase of the trial, as well as prior to the beginning of the punishment phase of the trial, not consider such emotional displays.

The court also specifically asked that jurors tell him if anyone had been influenced by the outburst. The court also took immediate action and had the victim's father removed from the courtroom.

This issue was raised again on the motion for new trial. The State obtained affidavits from each juror which were provided to the court and reflected in the record. (R. 90-101). On May 13, 1980, at an additional hearing on the motion for new trial, numerous witnesses were called to determine the potential bias of any jurors. Each individual juror was called as a witness to determine if anything improper took place concerning the outburst. Mr. Van Ballard testified that he did not recall the jurors discussing the outburst at any point among themselves. (M.N.T. 55).[2] Mr. Vincent testified that he did not recall any of the jurors discussing the outburst at lunch. He further stated that he did not recall that the jurors discussed it at any other time. (M.N.T. 62). The court then recalled Mr. Ballard at which time he testified that the outburst did not have any effect on his deliberations. (M.N.T. 69). Mr. Austin testified that he did not hear any discussion about the outburst while eating lunch, nor did he hear any word mentioned about it until they went out for their final deliberations. (M.N.T 73). Mr. Austin further testified in response to a question by the court that the outburst did not effect his deliberations. (M.N.T. 78).

Mr. Perkins testified at trial that he remembered one woman on the jury being a little upset and he was trying to calm her down. (M.N.T. 83). He testified that she seemed to be a nervous type of person anyway and he did not know if any of the other jurors heard the conversation. Mr. Perkins then testified that the outburst did not have any influence

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2/ M.N.T. refers to the transcript of the motion for new trial which was conducted on May 13, 1980.

on his verdict. (M.N.T. 88).

When Mr. Russell was called as a witness, he testified that he did not recall discussing the outburst with any jurors, although he did recall looking out the window and seeing Mr. Tanner outside a few minutes after he had been taken from the courtroom. At that time, Mr. Russell testified that the jurors did not know exactly what was going on or what had happened. (M.N.T. 93). He also testified that he recalled one juror being a little upset about being on the jury to begin with, but that she did calm down. (M.N.T. 95). He testified that the outburst did not weigh on his mind when considering punishment or the guilt or innocence of the Petitioner. Mr. Joseph Howard testified at the motion for new trial that nothing unusual occurred that influenced him or affected any of his decisions. (M.N.T. 108).

Mrs. Sutton testified that the outburst did not bother her. (M.N.T. 113). She said she did not remember Mr. Perkins trying to calm her down after the outburst because she was not that upset. Mrs. Sutton further testified that the outburst did not affect her deliberations as a juror. (M.N.T. 115, 118).

Mr. Selman testified that the outburst did bother him, but he knew that he had been sworn to go by the evidence and the law. (M.N.T. 120). Mr. Selman did state that he did not think that the outburst affected his deliberations in any way. (M.N.T. 125).

Mrs. Darden testified that although she did recall the outburst, she did not have any conversation during lunch concerning the outburst. She further testified that there was nothing unusual that occurred that would have affected her deliberations. (M.N.T. 131). Ms. Cauthen testified that she recalled the outburst, but she was concerned with listening

to the testimony. She based her decision on the testimony received at trial. She did remember being shocked by the outburst, but testified that her deliberations were not in any manner affected by it. (M.N.T. 135, 139).

Mr. Carruthers stated in response to the questions by the court that the outburst did not affect him in any manner. (M.N.T. 147). Mr. Camp testified, as did the remainder of the jurors, that the outburst did not affect his decisions in any manner. (M.N.T. 156).

It is clear from the testimony of the jurors, as well as the affidavits, that no juror allowed the outburst to affect his or her deliberations in this case. Most of the jurors were not even bothered by the outburst. Therefore, a mistrial was not required. The instructions by the court were sufficient to guarantee Petitioner's right to a fair trial.

In considering this issue on direct appeal, the Georgia Supreme Court found that the measures that are to be taken in such instances are left within the discretion of the trial court unless it is shown that a new trial would be necessary to insure a fair trial. The court found that the actions of the court, coupled with the testimony of the jurors clearly showed that a new trial was not necessary to guarantee Petitioner's right to a fair trial. Messer, supra at 23. Clearly, as the decision whether to grant a mistrial was within the discretion of the trial court, it should not be overturned absent an abuse of that discretion. As the trial court properly determined both at the trial and at the motion for new trial, that there was no prejudice resulting to the Petitioner from the comments by the father of the victim, there is no basis for a finding of abuse of discretion.

Respondent submits that the instructions by the court were sufficient to cure any possible prejudice that may have resulted. Furthermore, from the jurors' testimony, it is clear that they were not affected by the outburst of Mr. Tanner. Thus, Petitioner was not denied his right to a fair trial and there is no federal constitutional question presented for review by this court.

CONCLUSION

Respondent asserts that Petitioner received a fundamentally fair trial in the state court. Petitioner is not entitled to an independent state-paid psychiatrist prior to trial. Furthermore, the pretrial publicity and the outburst at trial were not such as to render Petitioner's trial fundamentally unfair. For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari filed on behalf of James E. Messer, Jr.

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